UNITED ORIX LEASING BHD

v.

KILANG PAPAN AGATHIS SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, SANDAKAN
LINTON ALBERT JC
[CIVIL APPEAL NO: S12-01-2001]
23 JULY 2003

CIVIL PROCEDURE: *Appeal - Appeal to High Court - Dismissal of application for summary judgment by subordinate court - Whether a "decision" - Whether finally disposing of rights of parties - - Whether a ruling made in course of trial or hearing of a cause or matter - Whether appealable - Courts of Judicature Act 1964, s. 3 - Subordinate Courts Rules 1980, O. 6, O. 26A, O. 49 r. 6(1)*

WORDS & PHRASES: *"Decision" - Definition of - Courts of Judicature Act 1964, s. 3*

The learned Sessions Court judge in this case had dismissed the appellant's application for summary judgment under s. 26A Subordinate Courts Rules 1980 ('SCR'). In the appeal that followed, the respondent raised an objection that the said decision of the Sessions Court judge was, upon the wording of s. 3 Courts of Judicature Act 1964 ('CJA'), not appealable. It was not in dispute that by s. 3 of the CJA any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose the rights of the parties does not constitute a decision for the purpose of the section and was, therefore, not appealable. In the circumstances, before the learned Judicial Commissioner herein, questions necessarily arose as to: (i) whether the decision of the Sessions Court judge dismissing the appellant's application for summary judgment was a "ruling made in the course of the trial or hearing of a cause or matter"; and (ii) whether the decision had "finally disposed of the rights" of the appellant and the respondents.

Held:

[1] The decision of the learned Sessions Court judge dismissing the appellant's application for summary judgment is a ruling made in the course of a "trial or hearing of a cause or matter", just as the decision of the learned Deputy Registrar under O. 56 r. 1 Rules of the High Court 1980 was held to be so by the Court of Appeal in *Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd* [2003] 2 CLJ 177. (p 428 c-d)

[2] There is no finality in the decision of the learned Sessions Court judge as there would be a trial before the said learned judge under the relevant provisions of the SCR to determine the rights of the appellant and the respondents. Consequently, the decision of the learned Sessions Court judge dismissing the appellant's application for summary judgment under O. 26A SCR is a ruling made in the trial or hearing which does not finally dispose of the rights of the appellant and the respondents and is therefore not appealable by virtue of the exclusion clause in the definition of "decision" in s. 3 of the CJA as amended. (pp 428 e & 429 c)

Obiter:

[1] The apparent inconsistency or conflict between the provision of O. 49 r. 6 SCR and the exclusion clause in the definition of 'decision' in s. 3 CJA as amended could be resolved by relying on s. 4 of the CJA. The clear and unequivocal wording of s. 4 CJA is that the exclusion clause in the definition of 'decision' in s. 3 of the CJA overrides the provisions of O. 49 r. 6 of the SCR. (p 428 g-h)

[Preliminary objection upheld; appeal dismissed.]

Case(s) referred to:

Cope v. United Dairies (London) Ltd [1963] 2 All ER 194 ***(refd)***

Gardner Steel Ltd v. Sheffield Brothers (Profiles) Ltd [1978] 3 All ER 399 ***(refd)***

Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd [2003] 2 CLJ 177 CA ***(foll)***

Thong Guan Construction Sdn Bhd v. Shencourt Properties Sdn Bhd [2001] 5 CLJ 244 HC ***(not foll)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 3, 4

Subordinate Courts Rules 1980, O. 26A, O. 49 r. 6(1)

For the appellant - Vicky Yee; M/s Dr Yee Tan & Assocs

For the respondents - Frederick Phang; M/s Lau Ngan Siew & Co

Reported by WA Sharif

JUDGMENT

Linton Albert JC:

This appeal arose from an unsuccessful application by the appellant (the plaintiff) for summary judgment under O. 26A of the Subordinate Courts Rules 1980 (SCR). The appellant being dissatisfied with the decision of the learned Sessions Court judge dismissing its application is appealing that decision under

O. 49 r. 6 SCR. The appeal is resisted by the respondents (2nd and 3rd defendants). At the outset of the hearing of the appeal learned counsel for the respondent, Mr. Frederick Phang raised a preliminary objection. It is contended for the respondents that the decision of the learned Sessions Court Judge dismissing the appellant's application under O. 26A SCR is not appealable by virtue of s. 3 of the Courts of Judicature Act (CJA) as amended.

Section 3 CJA as amended is as follows:

> "decision" means judgment sentence, or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of parties.

It might be useful to immediately set out O. 49 r. 6(1) SCR which is as follows:

> Notwithstanding anything contained in this Order, an appeal from any decision made after trial by the Court shall lie to a Judge in Chambers of the High Court.

Counsel for the respondents placed great emphasis on whether there was finality in the decision of the learned Sessions Court Judge. He submitted that the decision of the learned Sessions Court Judge in dismissing the application of the appellant for summary judgment under O. 26A SCR does not "finally dispose of the rights of the parties" in that the cause or matter between the appellant and the respondents will proceed to trial.

Counsel for the appellant, Ms Vicky Yee, on the other hand, contended that the decision of the learned Sessions Court Judge is appealable. It is argued on behalf of the appellant that if the learned Sessions Court Judge had decided in its favour the cause or matter would have been finally decided in that the respondents would have been liable to the appellant. Therefore, by implication the decision of the learned Session Court Judge dismissing the appellant's application must be considered as having finally disposed of the rights of the parties.

In attempting to resolve the conflicting arguments canvassed on behalf of the appellant and the respondents, I am guided by, indeed bound to apply the principles enunciated by the Court of Appeal in *Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd* [2003] 2 CLJ 177 where their Lordships held that the ruling of the deputy registrar on an issue regarding the admissibility of certain documents during the course of a hearing for assessment of damages was not appealable. The interpretation of s. 3 CJA as amended was succinctly explained at p. 184 where his Lordship PS Gill JCA delivering the judgment of the Court of Appeal stated as follows:

a On hindsight, we feel that this entire exercise on the interpretation of the meaning of a final order, and an interlocutory order was needless, and the case law that was tendered irrelevant. This is simply because one needs to merely look at the cold print of s. 3 CJA as amended, to see that any ruling made in the course of a trial or hearing of any cause or matter, which does not finally dispose the rights of the parties, does not constitute a decision for b the purpose of s. 3 CJA, as amended. This is the stark reality of s. 3 CJA as amended. It is simply, and lucidly stated leaving no room for doubt in its application. The intention of the legislature when drafting the amendment was that, the amendment should serve as a filter process for appeals.

c What we feel, however, must be emphasized, with equal force when scrutinizing s. 3 CJA as amended, is that, the said ruling must be made in the course of a trial, or hearing. Much emphasis, we feel, is placed on the latter part of the sentence *viz-a-viz* "... does not finally dispose of the rights of the parties", thus overlooking the fact that the ruling must be made in the course of a trial or hearing of any cause or matter. Counsel we found appeared to be preoccupied with the determination of whether the ruling disposes the d rights of the parties, but paid scant regard to the fact as to at what juncture the said ruling was made.

Equal weight should be attached to the entire sentence of s. 3 CJA as amended, for what must be asked, is not only whether a ruling does not dispose the final rights of the parties but also the question whether it was a e ruling made in the course of a trial or hearing, of any cause or matter. If it was not a ruling made in the course of a trial or matter, regardless of the fact that it did not dispose of the rights of the parties, it may not be excluded by the definition of 'decision" as provided in s. 3 of the CJA as amended, and is therefore appealable.

f I must now consider whether the decision of the learned Sessions Court Judge was a "ruling made in the course of the trial or hearing a cause or matter "between the parties."

The word "trial" is nowhere defined either in the SCR or the Rules of the g High Court. It is also not defined in the CJA. The word "hearing" is, however, clearly defined in O. 6 SCR as follows:

"hearing" means any proceedings in court or chambers and the expression "hear" and "heard" shall be considered accordingly.

h In *Gardner Steel Ltd. v. Sheffield Brothers (Profiles) Ltd.* [1978] 3 All ER 399 where the meaning of the word "trial" was an issue, Stephenson LJ at p. 401 stated as follows:

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Counsel for the plaintiffs has argued that we should give effect to the *obiter dictum* of Lord Denning MR. It plainly was obiter, but it commends itself to me as, if I may respectfully say so, sensible, likely to save costs and in accordance with the ordinary use of language. Summary trial is of course different from a full trial, and summary proceedings in chambers are different from proceedings in open court. I feel the force of those considerations which no doubt led to the existing practice in regarding summary judgment under RSC Ord. 74 as judgment not given in proceedings which have been tried. But counsel for the plaintiffs has called our attention to a definition in the current edition of *Stroud's Judicial Dictionary*: TRIAL; TRIED. (1) A "Trial" is the conclusion by a competent tribunal, of questions in issue in legal proceedings, whether civil or criminal.' That seems to me to be a natural interpretation of the words 'trial' and 'tried'.

The construction of the phrase "trial or hearing of the action, cause or matter was also considered in *Cope v. United Dairies (London) Ltd* [1963] 2 All ER 194 where at p. 197 Megaw J said:

Paragraph (5) uses those same words in, I think, deliberate contrast with other methods of putting an end to proceedings, such as discontinuance, default of appearance or summary judgment. That indicates that the dismissal of an action for want of prosecution is not comprehended within the words "trial or hearing of the action, cause or matter" in reg. 18(1). It follows that there never has been a trial or hearing of the action in this case. Therefore, the mandatory provision of reg. 18(1) for the determination of the amount of the plaintiff's liability for costs incurred during the period covered by the legal aid certificate could not be complied with.

Counsel for the defendants submitted that, although there was not a 'trial or hearing of the action" on June 8, 1962, when Master RITCHIE made the order for dismissal of the action at the end of twenty-one days, unless the plaintiff meanwhile should issue a summons for directions, nevertheless there was a notional "trial or hearing of the action" when the twenty-one days expired and the condition subsequent was fulfilled. He said that "trial or hearing of the action" meant no more than "the final determination of the matter". He pointed out that, if it were otherwise, there would be real difficulties in the way of a non-assisted person, in circumstances such as the present, obtaining a determination of the amount of costs payable by the plaintiff in respect of the legal aid certificate period. He said that the suggestion of counsel for the Law Society that the defendants could have themselves issued a summons for directions and obtained directions and thereafter a judgment by default, was unrealistic. It would necessarily involve the incurring of further, probably irrecoverable, costs. That may, indeed, be so on the regulations as they stand, and it may well be unsatisfactory. But I am unable to hold that the coming

> into effect of the dismissal of the action twenty-one days after the order of June 8, 1962, was a "trial or hearing of the action". It is inconsistent with any ordinary, or I think, any possible, meaning of the words, it is inconsistent with the indication of the meaning of the words to be derived from reg. 18(5).

In *Nikodo (S) Pte Ltd v. GVC Karaoke Sdn. Bhd* [1997] 2 CLJ 906 Abdul Kadir Sulaiman J (as he then was) held that the procedure in respect of an appeal pursuant to O. 49 r. 6 of the SCR is akin to the procedure in respect of an appeal from a decision of a registrar to a judge in chambers in interlocutory matters under O. 56 of the RHC.

In the light of the authorities set out above I hold that the decision of the learned Sessions Court Judge dismissing the appellant's application for summary judgment under O. 26A SCR is a ruling made in the course of a "trial or hearing of a cause or matter" in the definition of "decision" in s. 3 CJA as amended, just as the decision of the learned deputy registrar under O. 56 r. 1 RHC 1980 was held to be so by the court of Appeal in *Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd* [2003] 2 CLJ 177, *supra*. I must next consider whether the decision of the learned Sessions Court Judge on 15 December 2000 dismissing the appellant's application date 7 August 2000 for summary judgment be entered against the defendant under O. 26A SCR "finally disposes of the rights" of the appellant and the respondents. I am of the view that there is no finality in the decision of the learned Sessions Court Judge. The natural consequence would be a trial before the learned Sessions Court Judge under the relevant provisions of the SCR to determine the rights of the appellant and the respondents. I therefore agree with learned counsel for the respondents on this point and reject that of learned counsel for the appellant.

I am of the view that it is neither proper nor necessary in this appeal to consider the implications if the learned Sessions Court Judge had ruled in favour of the Appellant, as urged by learned counsel for the Appellants. To do so could mean venturing into a hypothetical realm which I do not intend to.

Finally, I have to consider the apparent inconsistency or conflict between the provision of O. 49 r. 6 SCR and the exclusion clause in the definition of "decision" in s. 3 of the CJA as amended. This is resolved by relying on s. 4 of the CJA which is reproduced below:

> In the event of inconsistency or conflict between this Act and any other written law other than the constitution in force at the commencement of this Act, the provision of this Act shall prevail.

The only natural and if I may add sensible conclusion derived from the clear and unequivocal wording of s. 4 of the CJA is that the exclusion clause in the definition of "decision" in s. 3 of the CJA as amended overrides the provisions of O. 49 r. 6 of the SCR. For that reason and with great respect I beg to differ with the learned judge in *Thong Guan Construction Sdn. Bhd v. Shencourt Properties Sdn Bhd* [2001] 5 CLJ 244 where it was held that O. 49 r. 6(1) prevails over the definition of 'decision" under s. 3 of the CJA as amended.

Having so concluded I now hold that the decision of the learned Sessions Court Judge in dismissing the appellant's application for summary judgment under O. 26A SCR is a ruling made in the trial or hearing which does not finally dispose of the rights of the appellant and the respondents and is therefore not appealable by virtue of the exclusion clause in the definition of "decision" in s. 3 of the CJA as amended. The respondents' preliminary objection is, therefore, upheld.

I am not unaware that if my judgment is correct the workload of the Subordinate Courts will invariably increase because unsuccessful applications for summary judgment must undergo the whole process of a full trial. On the other hand, I cannot and must not, however, ignore the judicial pronouncement made regarding the legislative intent of s. 3 CJA as amended which is to act as a filter process for appeals.

(See *Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd. supra* at p. 184).

For the reasons aforesaid this appeal is dismissed with costs.